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August 26, 1966

The Honorable Albert B. Maris
5050 United States Courthouse
Philadelphia, Pennsylvania 19107

Dear Judge Maris,

I have your letter of August 12th, transmitting the draft of appellate rules, and your letter of August 24th, containing the agenda for our meeting September 7th.

The Advisory Committee on Appellate Rules has done a splendid job. As you know, I have sat in on many of the meetings of that committee, and have seen first hand the hard and careful work which has gone into this draft. But my general admiration for the draft is not, I think, inconsistent with the belief that there are respects in which it can be still further improved. Thus I welcome your suggestions, and those of Bob Stern, for changes in detail, and particularly applaud your proposal to eliminate the requirements in Rule 32(a) as to the colors of the covers of briefs.

I would like to have on the agenda of our committee a matter which goes beyond mere detail. I do so with great reluctance at this late stage of the work, and particularly since I have expressed my views on the matter both publicly - see my article at 35 F.R.D. 317, at 323-325 - and to the members of the committee. But the point seems to me of such great importance that I feel that our committee is obliged to form an independent judgment on it. I refer, of course, to the compulsory joint appendix, called for by subdivisions (a) and (b) of Rule 30.

Six circuits - the First, Second, Third, Fourth, Sixth, and Seventh - now provide by rule for use of the appendix method, by which the appellant prints the parts of the record he thinks necessary as an appendix to his brief, and if the appellee feels that other parts of the record are necessary he prints them as an appendix to his brief. The Eighth Circuit in effect provides the same system, though its rule does not use the name "appendix."

The Fifth and Tenth Circuits continue to require the old printed record, but the Fifth Circuit Judicial Conference Rules Committee has endorsed the appendix system.

In the Ninth Circuit a printed record is used if both parties prefer, but in more than 95% of the cases three Xerox copies of the original papers are used in lieu of a record. See the Committee Note to Rule 30(f).

There is finally Rule 16 of the District of Columbia Circuit, which speaks of a "joint appendix" but which is prepared in the same manner - with designations and cross-designations and a single printed document - as is the

printed record in the Fifth and Tenth Circuits, where such a record is still used. It is the practice of the District of Columbia Circuit which is embodied in proposed Rule 30.

I would remind the members of our committee of the observation of its former member, the late Judge Charles E. Clark, that "There surely is no need of going back to the old required printed record, whether disguised as a joint appendix or otherwise." Arnold Productions, Inc. v. Favorite Films Corp., 291 F.2d 94, 96 (2d Cir. 1961). Judge Clark's view was shared by that other great procedural reformer, the late Judge John J. Parker, who spoke with special authority on this point since the appendix method was one of his many brilliant contributions to the improvement of the administration of justice. After years of experience with the appendix method, he wrote: "The requirement that each party print in his appendix the parts of the record that he desires the court to read is far better, in my opinion, than the rule of some courts providing for the printing of an abbreviated record to be agreed upon by counsel or even the printing of an agreed 'joint appendix.' Either of the latter methods almost invariably results in the printing of a large amount of irrelevant and unnecessary matter. It proceeds from the erroneous notion that only what is printed is before the court, and counsel for each side is unwilling to omit anything that he would like to be considered as a part of the case. It is a mere hangover of the old narrative statement and the misconceptions which accompanied it." Parker, Improving Appellate Methods, 25 N.Y.U.L.Rev. 1, 7-8 (1950).

The great vice of the old printed record was that it required the parties to decide what must be printed before the briefs have been prepared. This inevitably led to excessive printing, since a lawyer who has not yet written his brief cannot be sure which portions of the record will be necessary, and is inclined to designate too much on the chance it will be needed, rather than too little. It was precisely this which the appendix method was intended to cure. Yet Rule 30(b), as proposed to us, requires the appellant to designate what will go into the appendix within 10 days after the record is filed, and the appellee is given an additional 10 days in which to designate further matter.

The Advisory Committee was not unaware of this problem. In its only draft which has gone to the country, the designations of the contents of the appendix were to be made with the service of the briefs of the parties, and the appendix itself was to be served and filed within 14 days after service of the brief of the appellee. See Rules 30(b), 31(b), in March 1964 Preliminary Draft. But this in turn led to cumbersome provisions for reference to the appendix in the briefs, with one procedure permitted by the draft rules that in which the party would serve and file page proof copies of his brief at the appointed time, and after the appendix was printed would serve and file a second set of copies of the brief with the references to the appendix inserted. See Rule 28(e), in March 1964 Preliminary Draft. My own experience, in addressing the Judicial Conferences of the Fourth and Sixth Circuits with regard to these proposals, was that opposition was universal to that feature of the draft, and, as I recall, the written comments to the Advisory Committee expressed similar opposition.

In order to avoid the cumbersomeness of a joint appendix prepared after the briefs are written, the rule as now proposed to us calls for a joint appendix prepared before the briefs are begun. It is thus an invitation to the overprinting which the appendix method was invented to avoid.

I recognize very well the force of the arguments in favor of the joint appendix. It is convenient for the court to have the relevant portions of the record in one document rather than two, and in some cases the parties have failed to print enough, forcing the court to consult the single set of original papers on file. In truth these seem to me variants of a single argument, for if the appellant prints enough in his appendix it should rarely be necessary for the appellee to prepare a separate appendix. "Although the separate appendices method has been criticized because the court does not obtain a coherent picture of the case, one might question how great a burden the fragmentary nature of separate appendices really is. Seven circuits for many years have apparently found it not to be an impossible burden. The appellant should be on notice that he is under the primary obligation to print in the appendix to his brief all portions of the record relevant to the points he makes on appeal. If the courts enforce this requirement by refusing to consider assertions of error when the appellant has flagrantly violated this requirement by not reproducing all parts of the record bearing upon his arguments, the asserted defect in the separate appendix method will be largely rectified. The portions of the record relevant to the appellant's argument will be in the appendix to the appellant's brief. Normally, the appellee would have to reproduce little or no material. However, if the appellee attempts to defend the judgment upon a ground not covered by the appellant's brief, it is appropriate for those parts of the record furnishing the basis for the appellee's argument to be appended to the appellee's brief. Experience in seven circuits shows that the separate appendix procedure results in the least amount of unnecessary material being printed and consequently is the least costly."

Cohn, The Proposed Federal Rules of Appellate Procedure. 54 Geo.L.J. 431, 462 (1966).

I do not wish to minimize the force of the argument for a joint appendix. If the separate appendix system should be preserved, it would be desirable to make it clearer than existing rules have that the appendix of the appellant should include all which it is essential for the judges to read, and not merely that which supports the appellant's view of the issue.

But even if a joint appendix is substantially more convenient for the judges, that convenience must be balanced against the cost to the litigants from printing matter which, as the case develops, is unnecessary. In the current issue of Judicature, Dean Charles W. Joiner has a pertinent observation directed to members of procedural rules committees. "It is important," he says, "that all would-be procedural appraisers or reformers keep in mind the question, 'Is what is being suggested really in the total interest of the litigants or the public or is it simply for the convenience of the lawyers or the judge?'" Joiner, Lawyer Attitudes Toward Law and Procedural Reform, 50 Judicature 23 (1966). If that were the sole issue, I would feel obliged to oppose the compulsory joint appendix.

But there are other objections to Rule 30 as submitted to us. The rule will not solve the problem of the appellant's lawyer who is ignorant, careless,

or lawless. Such lawyers will continue to exist, and they will cause difficulty for appellate courts under the joint appendix method fully as much as under the system of separate appendices. At present if counsel for the appellant fails to print enough in his appendix, either appellee prints it in a separate appendix, or the court must go to the original papers for it. Under the proposed rule, if appellant designates too little, either appellee will designate it, or it will not be printed and the court again must go to the original papers for the additional paper. If appellee does designate additional material, the appellant can require the appellee to advance the cost or printing such material by advising appellee that he considers it unnecessary. This will be a fruitful source of controversy among the parties, which must ultimately be resolved by the appellate court. Rule 32(a) encourages use of methods of reproduction other than commercial printing. Must the appellate court resolve disputes as to whether the amount which appellant proposes to charge for reproduction on his office multilith is exorbitant? The last sentence of Rule 30(b) clearly leaves to the court the last word as between appellant and appellee on whether the parts designated by appellee were unnecessary, in considering how to divide costs. Finally, the last sentence of the Committee Note to Rule 30(b) suggests that the appellee may move to dismiss the appeal if the appellant flagrantly disregards his duty to set out necessary parts of the record in the appendix. Judge Clark accurately described the reaction of appellate courts to similar motions, in the old days of the printed record. "And to us these contests were completely frustrating, since they came at a time when we had no advance knowledge of what the appeal was about and little chance to learn from the generally inadequate affidavits submitted. It was an impossible situation to handle with any real intelligence." Arnold Productions, Inc. v. Favorite Films Corp., supra, at 95.

My guess is that after a few occasions in which the appellate court has had "to sit in judgment on the violent shadowboxing of counsel as to the contents of the record," id. at 96., the inconvenience of piecing together separate appendices will seem minor indeed. Thus I think that proposed Rule 30, which amounts in substance to a return to Rule 75 of the Equity Rules of 1912, will cause unnecessary printing by the parties with no corresponding benefit to the court.

Against all these a priori arguments stands the experience of the District of Columbia Circuit, where the compulsory joint appendix is said to work well. But it is by no means clear that what works well in that circuit, where there is a compact unitary bar well familiar with what is required, can be successfully imposed on the ten other circuits, where the bar is accustomed to a wide variety of state practices and where resort to the federal court of appeals is less common than it is in the District of Columbia.

Uniformity is a useful goal, though perhaps of less importance in appellate procedure than at the trial court stage. If we were to choose a single method of making the record available to the appellate court, and force it on all circuits, my own preference would be the practice of Xerox copies of the original papers, now used so successfully in the Ninth Circuit. I quote again from Dean Joiner: "Preparing records on appeal takes substantial lawyer time to cull the record and this is expensive. It costs about three dollars a page to print a record. With a few simple rules we could cut the cost of reproduction by two-thirds and eliminate most of the lawyer time in the pre-

paration of a record through the use of copying machines. The ability to make xerographic copies in a continuous process from microfilms will permit a copy to be made, including all costs, for about 4 1/2 cents a page. In addition, there is a permanent record from which copies can be made at any time for about the same cost. If the rule for the number of copies did not require more than are actually needed for the court and litigants, a full set of copies of the needed portion of a transcript could be made and bound for 4 1/2 cents a page or about one dollar for twenty-four copies. If only ten or twelve copies were made, it would cost about half that much, or 50 cents a page." Joiner, supra, at 25.

I have very little doubt that we will come in time to some form of the Ninth Circuit practice, and that proposed Rule 30(f), which permits any court of appeals to adopt that practice, will eventually make the remainder of the rule obsolete, just as former Rule 75(o) of the Civil Rules, adopted in 1948, permitting appeal on the original papers, in 14 years had made all the other provisions of Rule 75 about the record obsolete.

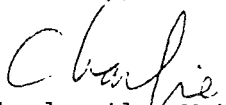
But since the District of Columbia Circuit is happy with its present practice, and the Appellate Rules Committee has endorsed that practice, I should be reluctant to impose the Ninth Circuit practice on other circuits, until they are ready for it, just as I am even more reluctant to impose the District of Columbia practice on the other circuits.

The Advisory Committee itself apparently does not think uniformity essential here. In Rule 30 subdivisions (a) and (b) regulate the joint appendix, described in the caption as the "ordinary method," but subdivision (c) provides an "alternative method" which may be used by stipulation of the parties or if the court so provides by rule or order. This is the "deferred joint appendix" under which the parties designate the contents of the appendix at the time they file their briefs. Finally subdivision (f) permits a court of appeals by rule or order to adopt the Ninth Circuit practice and dispense with the appendix altogether. Thus the proposed rule makes available every possible practice except that which most of the circuits, and most litigants, have preferred.

If diversity and experimentation are desirable, as the Advisory Committee apparently believes, my preference would be to provide for separate appendices as the usual method, but to offer the compulsory joint appendix, the deferred joint appendix, or the Ninth Circuit as alternatives which any circuit may by rule adopt, or, in the case of the first two, which the parties may use by stipulation.

I regret that this discussion has become so lengthy, but it illustrates why I think this question should be on our agenda. See you September 7th.

Sincerely,


Charles Alan Wright